No. 83-1490

In the Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF ALTOONA, PENNSYLVANIA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly directed the award of backpay to employees who were involuntarily retired in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is reported at 723 F.2d 4.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1983 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on March 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 7 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 626, provides in pertinent part:

> (b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections [11(b), 16] (except for subsection

(a) thereof), and [17 of the Fair Labor Standards Act of 1938, 29 U.S.C. 211(b), 216 and 217], and subsection (c) of this section. Any act prohibited under section [4] of this Act shall be deemed to be a prohibited act under section [15 of the Fair Labor Standards Act of 1938, 29 U.S.C. 215]. Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections [16 and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. 216 and 217]: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

* * * * *

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the [Secretary] to enforce the right of such employee under this Act.

Sections 16(b) (c) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(b), (c) and 217 provide in pertinent part:

(b) Any employer who violates the provisions of section [6] or section [7] of this Act [29 U.S.C. 206, 207] shall be liable to the employee or employees affected in

the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * * An action to recover [this] liability * * * may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * * The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. * * *

(c) * * * The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections [6] and [7] of this Act or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected * * *.

* * * * *

> The district courts * * * shall have jurisdiction, for cause shown, to restrain violations of section [15] of this Act, including in the case of violations of section [15(a)(2)] of this Act the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act * * *.

STATEMENT

By this petition, the City of Altoona seeks to avoid paying backpay to five firemen whom it discriminatorily discharged and forced into early retirement in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621, 634. It does not contest the conclusion of the court of appeals that the terminations violated the ADEA.

1. This action was brought by the Equal Employment Opportunity Commission (EEOC) pursuant to Sections 16(c) and 17 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 216(c) and 217, alleging that petitioner's terminations of five firemen, aged 59 to 61, violated the ADEA. The suit grew out of a charge of discrimination filed by Edward Shaffer, a 60 year-old fireman with 37 years' service, who alleged that, on March 23, 1979, he had been discharged because of his age during a reduction-in-force of petitioner's fire department.[1]

In the courts below, the city defended its action by alleging that the terminations were made pursuant to a state statute providing that when a city makes personnel reductions it must first discharge the oldest and most senior of those eligible for pension benefits. Section 11 of the Third

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[1]It is undisputed that the normal retirement age for City of Altoona firefighters is age 65. There is no contention that age 65 or younger is a bona fide occupational qualification under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1).

Class Cities Firemen's Civil Service Act of 1933, Pa. Stat. Ann. tit. 53, § 39871 (Purdon 1957) (hereinafter Section 11).[2]

The city also alleged that it acted under compulsion of an injunction from the Blair County Court of Common Pleas (Pet. App. 19a-21a). That state court action was filed in 1978, after the city decided to terminate its eight least senior fire-fighters as a means of reducing its budgetary problems. Those men sought a preliminary injunction in the Blair County Court of Common Pleas on the ground that their terminations would contravene Section 11 of the State Civil Service Act. The city, in defense, asserted that Section 11 conflicted with the ADEA and submitted a letter from the United States Department of Labor[3] asserting that the ADEA preempted Section 11. The city made no effort to join as parties those men who would be terminated if Section 11 were followed, or to have the case removed to federal district court. Nor did it seek the intervention of the United States or at any time file a declaratory judgment action.

The common pleas court denied the younger men's request for preliminary injunction, reasoning that an order to continue the employment of the younger men could have the effect of causing the city to terminate the older men and thus violate the ADEA statute and the Pennsylvania

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[2]Under city ordinance 4085 (Aug. 18, 1970), passed pursuant to the state's pension eligibility statute (Pa. Stat. Ann. tit. 53, § 39321 (Purdon 1957)), a fireman must be at least 50 years of age and have a minimum of twenty years' service to be eligible for pension benefits.

[3]ADEA enforcement authority was vested in the Department of Labor until July 1, 1979, when Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), transferred that authority to the Equal Employment Opportunity Commission.

Human Relations Act (Pet. App. 15a-18a).[4] After the terminations were effected, however, the court on March 16, 1979, issued a final order requiring the reinstatement of the younger men with backpay. It held that their terminations violated Section 11, but made no reference to the impact of the ADEA on that statute. Pet. App. 19a-21a. Although the court expressly noted that all parties understood that the order was a final decree from which an appeal could be taken, petitioner decided not to appeal and seek an interim stay.[5] Instead, five days later, the City Council resolved to reinstate the younger men with backpay and to terminate the seven oldest and most senior firefighters.[6]

2. The charge giving rise to this ADEA action was filed on July 18, 1979, less than four months after the older men were terminated (C.A. App. 11). This action was filed by the EEOC on March 18, 1981. On cross-motions for summary judgment, the district court entered judgment for petitioner, finding no violation of the ADEA. The court relied on a decision of the Pennsylvania intermediate court of appeals (*City of McKeesport* v. *International Ass'n of Firefighters,* 41 Pa. Commw. 133, 399 A.2d 798 (1979)) holding that Section 11 did not require the lay-off of individuals because of age but rather "because of the fact that

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[4]The court noted that the Pennsylvania Human Rights Commission had indicated that Section 11 was inoperative because it violated the Pennsylvania Human Relations Act (Pet. App. 17a).

[5]Although two intermediate appellate courts had ruled the month before that Section 11 did not conflict with the ADEA, *Schultz* v. *Piro,* 40 Pa. Commw. 395, 397 A.2d 484 (1979); *City of McKeesport* v. *International Ass'n of Firefighters,* 41 Pa. Commw. 133, 399 A.2d 798 (1979), the state supreme court had not ruled on the question.

[6]The two youngest of these men were recalled four days after their termination. One of the others has subsequently died (Pet. App. 6a & n.2).

they are eligible for pensions" (Pet. App. 12a).[7] The court of appeals reversed. It held (*id.* at 8a):

> The undisputed facts are that normal retirement age for City firefighters under the City's ordinance is 65, and that the pension eligibles were singled out for involuntary retirement pursuant to section 11 solely because they were the oldest, in years and in service, in the Department. There is no way in which what section 11 requires can be termed a "differentiation [ ] based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (1976 & Supp. V 1981). Even among pension eligibles, layoffs are on the basis of age. Moreover, seniority is in section 11 inexorably linked with age, and cannot be viewed as a separate factor.

The court held that the older men should be reinstated with backpay (subject to mitigation), stating (Pet. App. 10a) that petitioner "cannot now succeed in placing on the shoulders of older employees, protected by federal law, the burden of the consequences of the City Council decision to comply with the state court decree rather than appeal."

ARGUMENT

1. The court below had no discretion to deny an award of backpay to the firefighters petitioner forced to retire in violation of the ADEA. Section 7(b) of the ADEA (29 U.S.C. 626(b)) provides that "[a]mounts owing * * * as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections [16] and [17] of [the FLSA]" and the rights created by the ADEA are to be "enforced in

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[7]The district court also held that the ADEA was not applicable to state and local governments (Pet. App. 12a). However, as the court of appeals noted, that determination was made "without the benefit of the Supreme Court's subsequent opinion in *EEOC* v. *Wyoming*, [No. 81-554 (Mar. 2, 1983)]" (Pet. App. 7a).

accordance with the powers, remedies, and procedures" of specified sections (including Section 16(b) and (c) of the FLSA). The FLSA in turn declares that "[a]ny employer * * * shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be * * *" (Section 16(b) of the FLSA, 29 U.S.C. 216(b)),[8] and authorizes the employees affected (Section 16(b)) or the responsible agency (Section 16(c) of the FLSA, 29 U.S.C. 216(c))[9] to sue to recover the sums due.[10]

As this Court recognized in *Lorillard* v. *Pons*, 434 U.S. 575, 583-585 (1978), this statutory scheme provides to injured employees a legal right to enforce the employer's liability for backpay.[11] Nothing in that case or in the statute suggests that this right to back pay is lost when the EEOC, rather than the individual employee, sues to enforce the statute. Instead, Section 16(c), 29 U.S.C. 216(c), authorizes

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[8]Although the FLSA also provides for the recovery of an additional equal amount as liquidated damages (29 U.S.C. 216(b)), liquidated damages are available under the ADEA only where the violation is wilfull (29 U.S.C. 626(b)). No claim for such damages is before this Court in the present posture of this case.

[9]See note 3, *supra*.

[10]The agency (29 U.S.C. 217) or the employee (29 U.S.C. 626(c)(1)) may also seek an injunction or other equitable relief to "effectuate the purposes of the [ADEA]" (29 U.S.C. 626(c)(1)).

[11]Petitioner's reliance on *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), in arguing (Pet. 12) that injured employees may be denied backpay for equitable reasons, is flatly inconsistent with this Court's analysis in *Lorillard* v. *Pons, supra*, of the difference between the ADEA and Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), with which *Albermarle Paper* was concerned: "the ADEA incorporates the FLSA provision that employers 'shall be liable' for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of backpay is a matter of equitable discretion, see *Albermarle Paper Co.* v. *Moody*, 422 U.S., at 421" (434 U.S. at 584 (footnote omitted)).

the EEOC to sue on behalf of named employees to recover the sums due. And the fact that the private right of action provided in 29 U.S.C. 216(b) terminates upon the filing of an EEOC complaint under 29 U.S.C. 216(c) strongly suggests that Congress wished to avoid duplicative law suits, intending that the EEOC would assert the individual employees' absolute right to backpay as well as the public interest.[12] See *Marshall* v. *Brunner*, 668 F.2d 748, 752-753 (3d Cir. 1982) (reversing district court's determination that it had discretion to deny liquidated damages in FLSA suit by Secretary of Labor under 29 U.S.C. 216(c) where showing of entitlement under 29 U.S.C. 216(b) had been made).

2. Even if the law were less clear that employees who are discharged in violation of the ADEA are entitled to backpay, petitioner's fact bound claim that it was inequitable to award such relief in the particular circumstances of this case would not merit review by this Court. Contrary to petitioner's claims, the award of backpay here was entirely justified by the facts of this case in light of the purposes of the ADEA.

The broad purposes of the ADEA, like Title VII, are to make victims of discrimination whole, and to eradicate discrimination from the work place. Compare *Albermarle Paper Co.* v. *Moody*, 422 U.S. at 417-418 with 29 U.S.C. 623(a), (b). To the extent that the remedial provisions of the

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[12]Moreover, after this Court's decision in *Lorillard* v. *Pons*, *supra*, the courts have unanimously concluded that EEOC, like the private plaintiff in *Lorillard*, is entitled to a jury trial on an ADEA suit brought under Section 16(c), 29 U.S.C. 216(c), on the theory that that subsection also involves assertion of a legally enforceable right. *EEOC* v. *Brown & Root, Inc.*, 725 F.2d 348, 350 (5th Cir. 1984); *EEOC* v. *Corry Jamestown Corp.*, 719 F.2d 1219, 1223-1224 (3d Cir. 1983), and cases there cited. In contrast, Section 17, 29 U.S.C. 217, like Title VII, provides only for equitable relief; there is no right to jury trial in suits brought solely under Section 17. See *Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965) (FLSA).

ADEA are deemed to correspond to Title VII, backpay under the ADEA, as in Title VII, serves both purposes by redressing individual injuries and providing a motive for an employer to correct its employment practices. But for the prospect of backpay liability, employers "would have little incentive to shun practices of dubious legality." 422 U.S. at 417. Therefore, because "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes" (422 U.S. at 421), the presumption in favor of its award can seldom be overcome. *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978).

Nothing in this case defeats this presumption. Petitioner argues that it should escape liability because it acted in good faith (Pet. 11).[13] "This would read the 'make whole' purpose right out of [the ADEA], for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.' " *Albermarle Paper Co.* v. *Moody*, 422 U.S. at 422 (footnote omitted). On the other hand, holding "a muncipality * * * liable for all of its injurious conduct, whether committed in good faith or not," has the salutary effect of creating "an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' [statutory] rights". *Owen* v. *City of*

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[13]Petitioner similarly seeks to characterize its actions under Section 11 as benign, because "[w]hile discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor" (Pet. 9, quoting *Zinger* v. *Blanchette*, 549 F.2d 901, 905 (3d Cir. 1977)). After extensive hearings, Congress concluded that forcible retirement of older employees is *not* benign. It accordingly amended the ADEA in 1978 to prohibit involuntary retirement because of age and to clarify that the purpose of the Act was to ensure continued employment for older workers capable of performing their jobs, not to provide income security through pension benefits. 29 U.S.C. 623(f)(2). In doing so, it explicitly repudiated *Zinger* (see S. Rep. 95-493, 95th Cong., 1st Sess. 10 (1977)).

Independence, 445 U.S. 622, 651-652 (1980) (footnote omitted).[14] To deny backpay for the reasons advanced by petitioner would, therefore, frustrate the ADEA's dual purposes of redressing and preventing discrimination on the basis of age.[15]

The award of backpay is entirely justified by the facts of this case. Well before 1979, petitioner was notified by the agency responsible for enforcing and interpreting the ADEA that Section 11 of Pennsylvania's Civil Service Act was in conflict with the provisions of the federal law. This awareness of the definitive administrative determination of

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[14]Petitioner's invocation (Pet. 13) of *City of Los Angeles Department of Water & Power* v. *Manhart*, *supra*, for the proposition that backpay should be denied because municipal employers pass their losses to innocent taxpayers is similarly unavailing. In *Manhart*, retroactive liability was withheld because the relevant federal agencies had issued conflicting guidelines as to whether the city's pension practices violated federal law, and because retroactive liability would be "devastating" to pension funds and thus visit significant harm on innocent third parties who relied on those funds for retirement income. 435 U.S. at 720, 722-723; *Gurmankin* v. *Costanzo*, 626 F.2d 1115, 1124 (3d Cir. 1980). Here the city had an explicit directive from the Department of Labor advising it that the state law conflicted with the ADEA and its backpay liability to five individuals is an insignificant part of the city's total budget. Moreover, even if the ADEA rights of these five claimants had been less clear, "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Owen* v. *City of Independence*, 445 U.S. at 655. In short, the added expense to taxpayers is not reason enough to avoid backpay liability. *Carpenter* v. *Stephen F. Austin State University*, 706 F.2d 608 (5th Cir. 1983); *Liberles* v. *County of Cook*, 709 F.2d 1122, 1136 (7th Cir. 1983).

[15]For the first time in this litigation, petitioner also contends (Pet. 11 n.4) that discharging last hired firefighters would have exposed it to liability under its collective bargaining agreement. A collective bargaining agreement — a species of contract — cannot override the obligation not to discriminate imposed by federal statute. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

the invalidity of Section 11, standing alone, is sufficient to support the backpay award. *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 254 n.127 (5th Cir. 1974). Here, petitioner was additionally aware by 1979 (when the firemen were discharged) that the Pennsylvania Human Rights Commission had concluded that Section 11 was inoperative because it violated the State's Human Rights Act (Pet. App. 17a).

Nevertheless, when faced with a state court action challenging its decision to deviate from Section 11 by discharging its least senior firefighters, petitioner did nothing whatsoever to obtain an adjudication that would bind all interested parties and resolve its conflicting obligations under federal and state law.[16] Instead, petitioner assumed the risk—by choosing to defend that action alone—that it would be bound by a judgment upholding Section 11, and at the same time would remain vulnerable to an ADEA action by the federal government or its pension-entitled firefighters if it chose to proceed with a reduction-in-force under the terms of the state law.[17]

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[16]For example, had petitioner sought a declaratory judgment in state court, the court would have ordered joinder of all the potentially interested firemen. *County of Allegheny* v. *Commonwealth*, 71 Pa. Commw. 32, 453 A.2d 1085 (1983). Petitioner could also have petitioned to remove the state action to federal district court (see 28 U.S.C. 1441 and 1443) and sought to join pertinent state and federal officials as third-party defendants. Fed. R. Civ. P. 20(a); 5 U.S.C. 702; 28 U.S.C. 2201; Fed. R. Civ. P. 57. See, *e.g.*, *Rath Packing Co.* v. *Becker*, 530 F.2d 1295, 1305-1308 (9th Cir. 1975), aff'd, 430 U.S. 519 (1977).

[17]Unable to justify its own failure to protect its interests, petitioner instead suggests that those firefighters susceptible to discharge under the terms of the state statute should have intervened in the state court action (Pet. 5 n.1). Nothing in the record indicates that the pension-entitled firefighters were even aware of the state court action, much less that they should have realized the need to intervene to protect their interests.

Similarly, after entry of the state court's order directing reinstatement of the younger firefighters with backpay, petitioner declined to pursue any course of action likely to forestall the imposition of ADEA liability. As the court below noted (Pet. App. 10a), it chose not to appeal the trial court's order to the Pennsylvania Supreme Court, which had not yet resolved the conflict between Section 11 and the ADEA (note 5, *supra*). Instead, within a week of the state court order, petitioner involuntarily retired the senior firefighters despite its clear understanding that its action was unlawful in the eyes of the federal government.[18] Predictably, one of those employees promptly filed a charge with the EEOC, to which ADEA enforcement had by then been transferred. This suit followed.

Under these circumstances, the judgment below was hardly inequitable. Cf. *W. R. Grace & Co.* v. *Local 759*, No. 81-1314 (May 31, 1983), slip op. 9-10 (employer must bear the cost of its tactical decision to lay off employees according to the terms of a district court order when it was aware that the correctness of the court's decision was unsettled). Rather, to deny backpay would unjustly place the burden of

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[18]Petitioner's repeated assertion that it had "no choice" but to discharge the pension-entitled firefighters (Pet. 10, 11, 12) is specious. The city would not have been in contempt of the state court order had it continued to employ them (Pet. 12 n.5), for that order simply directed it to reinstate the younger firefighters with backpay. Nor would its "fiscal integrity" necessarily have been compromised by retaining these five individuals (Pet. 11); petitioner was free to economize in any manner consistent with the mandate of the ADEA. See *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 12 (the ADEA requires a state to achieve its goals in a manner consistent with the Act, "but it does not require the State to abandon those goals"). Indeed, petitioner's claim that the imposition of backpay liability against it creates "dissonance" between state and federal law (Pet. 13-14) is nothing more than an attempt to reargue *EEOC* v. *Wyoming*, *supra*.

petitioner's tactical errors on the innocent victims of its discrimination, in violation of the remedial purpose of the ADEA.[19]

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[19]Contrary to petitioner's claim (Pet. 14-15), the judgment below does not conflict with *Le Beau* v. *Libby-Owens-Ford Co.*, 727 F.2d 141 (7th Cir. 1984). In determining whether it was equitable to award backpay against employers found liable for violating federal law, the two courts merely reached different conclusions on markedly different facts.

At issue in *Le Beau* was whether backpay should be awarded under Title VII to women who had been restricted to certain jobs because a state protective law limited the amount of overtime that female employees could work. Denial of backpay was upheld principally on the ground that the employer had established a "good faith reliance defense" under 42 U.S.C. 2000e-12(b), by showing that it had relied on EEOC guidelines stating that such protective laws were consistent with Title VII. 727 F.2d at 148-149. The court also upheld the district court's conclusion that the award of backpay under Title VII would be inequitable because the employer was "on the horns of a dilemma" in light of the state statute, because EEOC's guidelines allegedly sanctioned the statute, and because the individual plaintiffs had not complained of the discriminatory practices either to the employer or the EEOC until after the employer had voluntarily eliminated these practices. 727 F.2d at 147-150. Not one of these mitigating circumstances is present here. Moreover, through the prompt filing of an EEOC charge by one of the claimants here, petitioner was afforded the opportunity—unlike Libby-Owens—voluntarily to bring itself into prompt compliance with the ADEA and thus to avoid the accrual of backpay liability. See ADEA Section 7(b), 29 U.S.C. 626(b).

In any event, there is no conflict in decisions because, as we have shown (pages 7-9, *supra*), under the ADEA, unlike Title VII, there is a legally enforceable right to backpay which the courts are without equitable discretion to deny.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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